82-1211

NO.

Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

JAMES FRANCIS FRY,

Petitioner,

JIMMY RINCON MARTINEZ,

Petitioner,

VS.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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QUESTIONS PRESENTED

1. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. WHETHER THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' WARRANTLESS ARREST IN THEIR HOME TO OVERCOME THE PER SE UNREASONABLENESS OF SAID ARREST?

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OPINION BELOW

The Opinion of the Texas Court of Criminal Appeals is reported in volume 639 of the Southwestern Reporter, second series, beginning on page 463 (639 S.W.2d 463). The decision was by vote of five to four.

JURISDICTION

The Texas Court of Criminal Appeals by panel opinion reversed Petitioners' convictions on June 9, 1982, whereupon Respondent filed a motion for rehearing. The Court below sitting en banc affirmed the convictions on October 6, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

Article 14.04, Code of Criminal Procedure of the State of Texas, V.A.C.C.P.:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without a warrant, pursue and arrest the accused."

STATEMENT OF THE CASE

The Court is herein referred to pages in the transcription of trial testimony on file in the court below, i.e., the Statement of Facts (S/F). The Court is also referred to the facts as set out in the opinion of the Court below beginning at A-1 in the Appendix to this Petition.

Petitioners were among four persons accused of committing aggravated robbery upon the complainant Robert Herdman on March 25, 1978, in Dallas, Texas. Herdman testified that upon taking William Paddock home at 3:00

a.m. on March 25, 1978, he was ordered, at gunpoint, into a house that was three blocks from his apartment. Thereafter, Herdman, according to his testimony, was beaten and robbed of all his money by four individuals over a period of approximately ten hours. Herdman was taken back to his apartment at 2:00 p.m. on the same day and reported what happened to Dallas Police Officer Swafford (S/F 43-88).

Herdman's fiancee, Carol Hutrya, testified that two men attempted to burglarize Herdman's apartment earlier that morning around 5:00 a.m. She testified that one of the men was Paddock, whom Herdman had earlier left to take home, and the other was Petitioner Fry. Hutrya reported the incident to Officer Duesman and after they both drove around the neighborhood no car fitting the description of the one Herdman and Paddock left in earlier was found. She did not see Herdman again until around 2:00 p.m. when he returned to his apartment (S/F 89-163).

Officer Duesman was given a description of the car by Hutyra. The license number was stated to him and that it was an out-of-state plate, possibly California. The car was a blue and white Chevrolet. Duesman made a written report and left it for his replacement watch (S/F 164-186).

Investigator J. C. Arnold during the afternoon of March 25, 1978, received a call to proceed to 2833 Community Drive. He arrived there at approximately 3:00 p.m. (S/F 212), and talked to Officer Swafford and then to Herdman (S/F 213). Arnold talked to Herdman for about 30 to 40 minutes and afterward proceeded to a police substation where he phoned the Crimes Against Persons Section of the Dallas Police Department. Arnold requested additional manpower. He also told the sergeant on duty

that he "knew where the suspects probably were", and that he "didn't have time to secure a warrant" (S/F 215). Arnold also testified that on his way to the substation to call downtown he drove past 2415 Community Drive and saw the Chevrolet with California tags parked in front. After making the call he immediately went back to a position across the street from the suspects' house and "sat and watched the house" (S/F 219). Further, Arnold stated that "I went over to near Community and Harry Hines where I could observe the house in case the people left" (S/F 219). He stated that he watched the house approximately 25 to 30 minutes, and he "didn't see anything occur at the house" (S/F 220).

Upon arrival of a cover squad, Arnold and the other officers proceeded to the suspects' house at about 4:15 p.m. (S/F 222). Arnold knocked down the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four suspects, including Petitioners, were then arrested. Only Petitioner Martinez was awake when the police officers entered the house. At trial the following items, seized in Petitioners' home, were admitted into evidence over objection: a sawed-off shotgun, a shotgun, a rifle, a baseball bat, a wooden club, three spent tubes of toothpaste, a knife, a shotgun shell, and hair specimens. In addition, thirteen photographs of various parts of the house, which were taken at the time of the arrest, were admitted into evidence.

No officers attempted to contact a magistrate in order to obtain an arrest warrant. Officer Arnold testified that because it was a Saturday he did not think such an attempt would be successful.

ARGUMENT ON QUESTIONS PRESENTED

1. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The most recent interpretation of Article 14.04 by the court below was in Petitioners' case, *Fry and Martinez v. State*, 639 S.W.2d 463 (Tex. Crim. App. en banc, 1982). See also Appendix "A-1", *et seq.* Texas courts have not been consistent in their interpretation of this statute. Presently the court below holds that Article 14.04:

> ". . . does not require a showing that the offender was in fact about to escape, nor does it require that there in fact was no time to procure a warrant. The statute merely requires a showing that the officer was acting upon satisfactory proof from representation by a credible person that the felony offender 'is about to escape, so that there is no time to procure a warrant'."

Fry v. State, supra at A-34.

In order to properly develop the foregoing conclusion, a brief examination of the Texas court's treatment of this statute and its identical predecessor should be considered. Basically there have been two differing interpretations of Article 14.04 and the element that the accused must be "about to escape" before a warrantless arrest upon satisfactory proof may be made. Initially, the judicial interpretations held that the arresting officers must actually show that the offender was about to escape and that showing was indispensable. The showing by the officers must have

arisen from events they themselves witnessed or observed. *Cortez v. State*, 60 S.W. 536; *Rippy v. State*, 53 S.W.2d 619 (Tex. Crim. App., On Mot. for Reh., 1932); *Vinson v. State*, 137 S.W.2d 1048 (Tex. Crim. App., 1940). Imminent escape has long been held essential to a warrantless arrest under Article 14.04 and its predecessor. *Honeycutt v. State*, 499 S.W.2d 662, 664 (Tex. Crim. App., 1973).

> "In accordance with the strict construction given exceptions allowing warrantless arrests, this court has always required a clear showing the person arrested was about to escape."

Honeycutt v. State, supra at 665.

The first hint of a departure from *Honeycutt* was in a panel opinion of the court below in 1978 holding a warrantless arrest of suspects at a motel was permissible under Article 14.04 because the officers had been told by their informant that the suspects were about to leave the motel. Upon arriving at the motel and not seeing the suspects' vehicle, the officers feared that they had already fled. The court held that the officers had probable cause to believe that the suspects were about to flee and upheld the warrantless arrest. *Tarpley v. State*, 565 S.W.2d 525 (Tex. Crim. App., Panel No. 1, 1978).

In 1979, there was a further departure from prior precedent in *Maloy v. State*, 582 S.W.2d 125 (Tex. Crim. App., Panel No. 1, 1979)[1] In that case the arresting officers received information from their informant that the accused was about to "bug out" or flee the city soon. In upholding the warrantless arrest of the accused in his home, the court

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[1]The Court below relied solely on **Maloy** to arrive at its holding in the present case. See Appendix.

below simply reasoned that the officers acted in accordance with Article 14.04.

Another panel of the court below, in 1980, although in a case where the arrest was on a public street, reiterated that Article 14.04 requires a clear showing that the person arrested was about to escape. See *Hardison v. State,* 597 S.W.2d 355 (Tex. Crim. App., Panel No. 3, 1980). However, *Tarpley v. State,* supra, (information that suspects about to leave motel) was cited to show that all that was needed was information that the suspect was about to escape and some evidence about the time required to obtain a warrant. In *Hardison,* there was no information given to the arresting officer regarding escape nor was there any testimony that the officer felt there was no time to procure a warrant, and the Court declined to uphold the warrantless arrest. It would appear that the court below was moving toward the conclusion it reached in Petitioners' case that Article 14.04 required only that the officers be told that the offender was about to escape. In early 1982, the court below in yet another panel opinion, *Hogan v. State,* 631 S.W.2d 159 (Tex. Crim. App., Panel No. 3, 1982),[2] reversed a case involving a warrantless arrest in a tavern based on probable cause but not in compliance with Article 14.04. The key inquiry by the court:

> ". . . was it shown to the police officers that the appellant was about to escape? There was nothing in the record to show that the police officers were under the impression that the Appellant was about to escape and they would not have time to procure a warrant."

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[2]This opinion was authored, interestingly, by Judge McCormick, who dissented in the panel decision below. See Appendix.

The court below went on to state that under Article 14.04, a showing that the offender is about to escape is indispensable, citing *Honeycutt v. State,* supra. The court also found that there were no exigent circumstances. This case would tend to support the trend that Article 14.04 requires only that the officers be told that the offender is about to escape and not a "clear showing" that he is about to escape.

However, the court below one month later in May, 1982, rendered another decision, this time upholding a warrantless arrest under Article 14.04. See *King v. State,* 631 S.W.2d 486 (Tex. Crim. App., en banc, 1982). In *King,* supra at 497-498, the court again cites *Honeycutt v. State,* supra, as authority that there must be a clear showing the person arrested is about to escape. The court stated that the constitutional validity of a warrantless arrest or search can only be decided in terms of the "concrete factual situation presented" by each individual case, citing *Brown v. State,* 481 S.W.2d 106, 109 (Tex. Crim. App., 1972). The court went on to hold:

> "Thus, manifestly, from the 'concrete factual situation' spread on the record, it must be apparent that the offender was, in fact, 'about to escape'."

King v. State, supra at 497.

Petitioners would submit that the en banc decision in *King* reverses the "trend" by the court below up to this point to hold that the only requirement under Article 14.04 is that a credible person tell the arresting officers that the offender is about to escape. It would seem with *King* that it must appear *in fact* to the arresting officers that the offenders are about to escape. However, the next interpretation by the court below was in the present case, *Fry v. State,*

supra. In this case, the court below of course went back to the trend prior to *King* and held for the first time that no showing is required, in fact, that the offender is about to escape but only that a credible person tell the officers that the offender is about to escape.

It is also important to point out that the court below has not only been inconsistent in its interpretation of Article 14.04, but it has on occasion abandoned the statute altogether. The Texas court, in *Milton v. State*, 549 S.W.2d 190 at 192 (Tex. Crim. App., 1977), speaking through Presiding Judge Onion reflected upon the comparison of Article 14.04 to federal constitutional standards:

> "Unquestionably this state statute imposes greater restrictions on peace officers than does the federal constitution as interpreted by the United States Supreme Court."

In *Milton* the court held that it was not necessary to determine whether the requirements of Article 14.04 were met, but instead authorized the warrantless arrest of the accused in a cafe under *Terry v. Ohio*, 392 U.S. 1 (1968) and *United States v. Watson*, 433 U.S. 411 (1976). The court below likewise had declined to treat a warrantless arrest of the driver of an automobile as controlled by Article 14.04. See *Washington v. State*, 518 S.W.2d 240 (Tex. Crim. App., 1975) where the court merely mentioned Article 14.04 without applying it to the specific facts, but reasoned instead that the arrest was justified upon probable cause and exigent circumstances. See also *Jones v. State*, 565 S.W 2d 934 (Tex. Crim. App., Panel No. 2, 1978) where the court never even mentioned Article 14.04 to determine the legality of a warrantless arrest of a person in his home. Instead the court ruled that there was probable cause and

exigent circumstances citing only Texas authority and no federal authority.

It should be likewise pointed out that one month after Petitioners' convictions were affirmed, the Texas court decided yet another warrantless arrest case, presumably controlled by Article 14.04, *Jones v. State*, 640 S.W.2d 918 (Tex. Crim. App., Panel No. 1, 1982). In this *Jones* case the accused was arrested without a warrant but upon probable cause as he stepped off an airplane at Houston Intercontinental Airport. After detailing the facts to support a finding of probable cause, the court merely concluded that "there were exigent circumstances" justifying the officer's failure to obtain a warrant without stating what the circumstances were. The only mention of Article 14.04 in the opinion was: "Further, the arrest was proper under Article 14.04, V.A.C.C.P." See also Judge Clinton's dissent at page 921 which complains that the majority failed to apply Article 14.04.

By all of the foregoing, Petitioners would show this Court that the Texas Court of Criminal Appeals has not consistently applied Article 14.04 to fact situations involving warrantless arrests. Since the court below has apparently acknowledged that Article 14.04 imposes greater restrictions on arresting officers than does federal constitutional standards, whether the lower court is consistent in applying Article 14.04 is not one which would necessarily invoke the authority of this Court with one exception: If the Texas court, in its inconsistency and arbitrariness, fails to construe fact situations or interprets otherwise more restrictive state rules in a manner that does not meet federal constitutional standards, then the citizen should be heard in this last Court.

In this connection, it is most important to point out that Texas has *never* distinguished between warrantless arrests in one's home as opposed to elsewhere in its many opportunities to interpret Article 14.04. This Court has certainly made that distinction in *Payton v. New York*, 445 U.S. 573 (1980) and *United States v. Watson*, supra. Texas, from the earliest times, never needed to recognize specially the sanctity of a person's house because Article 14.04 and its predecessor was, and is on its face, more restrictive to police activity than current federal constitutional standards, e.g., "exigent circumstances" as enunciated in *Dorman v. United States*, 435 F.2d 385 (D.C. Cir., en banc, 1970).

The original panel opinion below attempted, for the first time in Texas, to construe the importance and significance of *Payton v. New York*, supra. But in doing so, the panel observed that a peace officer's authority to make a warrantless arrest is controlled exclusively by statute (Article 14.04), *Fry v. State*, supra at A-9, and therefore there was no need to consider the federal standards because the facts of Petitioners' case failed under the state standards. The panel opinion found that the sole question was whether the State met its burden of proving that the arresting officers reasonably believed that the Petitioners were about to escape, so that there was no time to procure a warrant, supra at A-9.

The court below, sitting en banc, decided to construe Article 14.04 as meaning something entirely different. Petitioners would contend that the new construction placed on that statute violates the Fourth Amendment for the following reasons:

A. It does not distinguish warrantless arrests in a person's home. It fails to recognize, as this Court has so

recognized, the sanctity of the home.

B. The requirement that there merely be "a showing that the officer was acting upon satisfactory proof from representations by a credible person that the felony offender is about to escape, so that there is no time to procure a warrant" makes the exigency of the fact situation turn only on the observations of the "credible person" and not the arresting officers. This clearly does not comport with *Payton v. New York*, supra, and *Dorman v. United States*, supra. It was never intended that exigency of the situation, so as to excuse the necessity of a warrant, would be decided prior to the involvement of the police and only "represented" to them later.

C. The Texas statute, Article 14.04, is similar in many respects to the New York statute that was condemned in *Payton v. New York*, supra, in that both laws spell out the procedure required in making warrantless arrests. In New York law, New York Crim. Proc. Law §140.15(4) (McKinney, 1971), went somewhat further than Texas and instructed upon the warrantless entry of premises where an offender might reasonably be found. In addition to the escape "exigency" in Texas, New York provided "exigencies" regarding the protection of life or safety of the officer or another person as well as the potential destruction, damaging or secretion of evidence. It should be noted that this Court took special pain to quote from the dissent in the *Payton* case before the New York Court of Appeals, 408 N.Y. 2d 300; 380 N.E.2d 224 (1978):

> "The dissenters noted . . . 'the statutory authority of a police officer to make a warrantless arrest in this State has been in effect for almost 100 years' but concluded that 'neither antiquity

> nor legislative unanimity can be determinative of the grave constitutional question presented' and 'can never be a substitute for *reasoned analysis*'." [Emphasis supplied]

Payton v. New York, supra at 1377-8. The Texas Courts have not, except by panel opinion which could be characterized as a dissent[3], given analysis, much less a reasoned one, to the "grave constitutional question" here presented. The New York Court of Appeals attempted to distinguish the sanctity of the home (it simply decided the question incorrectly). Texas Courts have not made the attempt, and their construction of Article 14.04 has resulted in the implementation of no greater restrictions on police intrusions into the home than was provided in the New York statute.

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2. WHETHER THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' WARRANTLESS ARREST IN THEIR HOME TO OVERCOME THE PER SE UNREASONABLENESS OF SAID ARREST?

The arrest of Petitioners, being without warrant and in their own home, was per se unreasonable unless the police can show it falls within one of the exceptions based on the presence of exigent circumstances. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Payton v. New York,* supra; *Dorman v. United States,* supra.

The facts in this case are not disputed. The complainant Herdman, upon reporting the offense to the police at 2:00 p.m. to a patrol officer, stated that he had been beaten and

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[3]**Fry v. State,** supra at A-5-6.

robbed at a nearby house by four men. At 3:00 p.m. a detective, Officer Arnold, arrived at Herdman's apartment and Herdman told Arnold that the men had discussed leaving for California that day. He also told them that at the time he was released, about 2:00 p.m., three of the four men were asleep or passed out. Arnold left Herdman's apartment about 3:30 p.m. and drove to a nearby police substation. He called the Crimes Against Persons Section of the police department and requested additional manpower to assist him in arresting the four men described by Herdman. He told the sergeant on duty that "he knew where the suspects were" and that he "didn't have time to secure a warrant". After making the call, Arnold drove to a position near the house. He kept it under surveillance until the back-up officers arrived about 30 minutes later. During that time Arnold saw nothing occur at the house. *Fry v. State*, supra at A-4. Arnold had been told by Herdman's girl friend that the four men had a blue and white Chevrolet with out-of-state plates, possibly California. On his way to the police substation Arnold drove past the house and saw that automobile parked in the front yard. It had California plates.

At about 4:15 p.m., Arnold and the other officers surrounded the house. Arnold knocked on the front door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. Only one of the four men was awake when the police entered the house. *Fry v. State*, supra at A-4.

Petitioners would attempt to make the "reasoned analysis" that has not heretofore been afforded them by the Texas courts.

A.

> "Terms like 'exigent circumstances' or 'urgent need' are useful in underscoring the heavy burden on the police to show that there was a need that could not brook the delay incident to obtaining a warrant, and that it is only in the light of those circumstances and that need that the warrantless [arrest] meets the ultimate test of avoiding condemnation under the Fourth Amendment as 'unreasonable'."

Dorman v. United States, supra at 392.

In considering the "exigent circumstances" put forth in *Dorman v. United States*, Petitioners readily admit that most of the circumstances are successfully met by the State. There is no question that a grave offense was involved; that the suspects were likely to be armed; that there was strong reason to believe that the suspects were in the premises; and that the entry was made in the daytime rather than at night.

On the issue of whether there was a clear showing of probable cause including "reasonably trustworthy information", the record below will reflect that sufficient probable cause existed upon which a magistrate could have issued an arrest warrant.

Regarding the likelihood that the suspects would escape if not swiftly apprehended, the record reflects that there was no likelihood of an escape. Thus, it cannot be said that there was an "urgent need" to forego the obtaining of a warrant. It is important to note that Herdman, as the record below reflects, had just gotten out of the shower

when his girl friend arrived at his apartment with Officer Swafford. He had made no outcry of the crime prior to Swafford's arrival at about 2:00 p.m. In fact, the first thing Herdman did was take a shower. He then reported the offense to Swafford and the location of the suspects. Approximately one hour transpired before Arnold arrived (why did Swafford not call for cover squads and pursue the suspects?). Herdman then restated the events to Arnold and said that the suspects discussed leaving that day for California. At about 3:30 p.m. Arnold left Herdman's apartment and drove to a police substation and on the way intentionally drove by the suspects' house and observed the automobile with California plates (why did Arnold not call for cover then and immediately arrest the suspects?). After making a call to a superior officer to advise him that "he knew where the suspects probably were and that he didn't have time to secure a warrant", *Fry v. State*, supra at A-4, he returned to the suspects' house and kept it under surveillance for about 30 minutes until his cover officers arrived (all the time noticing that the suspects' automobile remained in their front yard and that there was no attempt to escape).

Therefore, it can be found, as it was in the panel opinion below, *Fry v. State*, supra at A-7, that the belief of the officers that the suspects were about to escape was ambiguous at best. The panel opinion resolved that ambiguity in favor of Petitioners. Thus, there is no showing of "urgent need" to forego the warrant requirement because the officer's surveillance would not have allowed an escape. There is a further reason to negate that "urgent need" as will be shown following.

B.

> "To complete the analysis we must consider the other side of the question: What delay would have been involved in obtaining a warrant?"

Dorman v. United States, supra at 394.

The panel opinion below, *Fry v. State*, supra at A-7 — A-13, reflects that the officers never attempted to contact a magistrate, and that Arnold's assumption that there was no time to secure a warrant does not meet the test of reasonableness.

No delay would have been involved in obtaining a warrant in this case because the suspects were already, in effect, prisoners, being under constant surveillance and unable to escape.

CONCLUSION

Petitioners contend that the interpretation placed on Article 14.04 by the Texas Court of Criminal Appeals in the case below fails to provide the necessary safeguards and restrictions upon police conduct in carrying out warrantless arrests in the home, the same being presumptively unreasonable.

Petitioners further would contend that when the "reasoned analysis" that should be made upon such a "grave constitutional question" as this is made in the present fact situation, the presumption of unreasonableness cannot be overcome. The facts of the case below fail to show that an "urgent need" was presented to the officers who broke into the home of Petitioners.

It is respectfully urged that the writ of certiorari be granted and this Court reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, TOM S. McCORKLE, Counsel for Petitioners JAMES FRANCIS FRY and JIMMY RINCON MARTINEZ, hereby certify that copies of the above and foregoing Petition For A Writ of Certiorari to the Court of Criminal Appeals of Texas have been mailed to the following person:

HONORABLE JIM MATTOX
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711

by placing same in the United States mail, certified, postage prepaid, on this 4th day of January, 1983.

/s/ Tom Scott McCorkle, Jr.

FRY v. STATE
Cite as Tex. Cr. App., 639 S.W.2d 463

JAMES FRANCIS FRY ..... *Appellant*

v.

THE STATE OF TEXAS ..... *Appellee*

JIMMY RINCON MARTINEZ ..... *Appellant*

v.

THE STATE OF TEXAS ..... *Appellee*

Nos. 61122, 61123

COURT OF CRIMINAL APPEALS OF TEXAS,
PANEL NO. 1

JUNE 9, 1982

ON REHEARING OCT. 6, 1982

Defendants were convicted in the 203rd Judicial District Court, Dallas County, Thomas B. Thorpe, J., of aggravated robbery, and they appealed. The Court of Criminal Appeals, Odom, J., held that robbery victim's report to police officers that defendants had told him they were leaving for California that day was sufficient to show exigent circumstances authorizing a warrantless arrest of defendants in their own home.

Affirmed.

Onion, P. J., and Roberts, Clinton and Teague, JJ., dissented.

1. Arrest — 63.1

Statute dealing with warrantless arrest does not require a showing that the offender in fact was about to escape, nor does it require showing that there in fact was no time to procure a warrant; rather, the statute merely requires a showing that the officer was acting upon satisfactory proof from representations by a credible person that the felony offender "is about to escape, so that there is no time to procure a warrant." Vernon's Ann. C.C.P, art. 14.04.

2. Arrest — 63.1

Robbery victim's report to police officers that defendants had told him they were leaving for California that day was sufficient to show exigent circumstances authorizing a warrantless arrest of defendants in their own home. Vernon's Ann. C.C.P. art. 14.04; Vernon's Ann. Const. Art. 1, §9; U.S.C.A. Const. Amend. 4.

Tom S. McCorkle, Dallas, for appellant.

Henry M. Wade, Dist. Atty., Karen Chilton Beverly, C. Wayne Huff and Will Wilson, Jr., Asst. Dist. Attys., Dallas, Robert Huttash, State's Atty., Austin, for the State.

Before ROBERTS, CLINTON and McCORMICK, JJ.

OPINION

ROBERTS, Judge.

These appeals are from convictions for aggravated robbery. These appellants were tried together and each was assessed as punishment confinement for seven years.

The appellants do not challenge the sufficiency of the evidence. In their sole ground of error they contend that certain evidence admitted at their trial was the product of an illegal search and seizure. We agree.

The appellants were among four persons accused of committing an aggravated robbery of the complainant, Robert Herdman, on March 25, 1978, in Dallas. Herdman was reported missing during the early morning hours of March 25 by his fiancee, Carol Hutyra. Hutyra reported seeing Herdman leave his apartment with co-defendant William Paddock. As they left, Hutyra noted that the car had California license plates; she wrote down the license number. About 5:00 a.m. the car returned to the apartment complex without Herdman. Appellant Fry and co-defendant Paddock got out of the car. They then attempted to burglarize Herdman's apartment. When Hutyra screamed they left. Hutyra reported the incident to a police officer who left a written report for his replacement watch.

Later that afternoon, Officer Swafford followed up the report. He picked up Hutyra at her apartment and took her back to Herdman's apartment to see if he had returned yet. They arrived there about 2:00 p.m. and discovered that Herdman had just arrived. Herdman had been very badly beaten.

Herdman then told Officer Swafford that at about 3:00 a.m. he had taken Paddock home. Upon arriving at the house, which was about three blocks from his apartment, Herdman was ordered into the house by appellant Martinez who was holding a shotgun. During the next ten or eleven hours Herdman was robbed and repeatedly beaten by four men inside the house. At about 2:00 p.m., the men finally

agreed to release Herdman, and appellant Martinez drove him back to his apartment.

About 3:00 p.m., Officer Arnold arrived at the apartment. Herdman again related the day's events to Arnold. He told Arnold that the men had discussed leaving for California that day. He also told him that at the time he was released three of the four men were asleep or had passed out.

Arnold left Herdman's apartment about 3:30 p.m. and drove to a nearby police substation. He called the Crimes Against Persons Section downtown and requested additional manpower to assist him in arresting the four men described by Herdman. He told the sergeant on duty that he "knew where the suspects probably were" and that he "didn't have time to secure a warrant."

After making the call, Arnold drove to a position near the house. He kept it under surveillance until the back-up officers arrived about thirty minutes later. During that time Arnold saw nothing occur at the house.

About 4:15 p.m., Arnold and the other officers surrounded the house. Arnold knocked on the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four men were then arrested, and numerous weapons and other items were seized. Only appellant Martinez was awake when the police officers entered the house.

Before their joint trial, the four co-defendants filed a motion to suppress all items seized as a result of their arrest and the search of their residence. After an extensive hearing, the trial court overruled the motion. At trial the follow-

ing items were admitted into evidence: a sawed-off shotgun, a shotgun, a rifle, a baseball bat, a wooden club, a chain belt, a bayonet, a butcher knife, an aerosol spray can, three spent tubes of toothpaste, a knife, a shotgun shell, and hair specimens. In addition, thirteen photographs of various parts of the house, which were taken at the time of arrest, were admitted into evidence. Three photographs of the house which were taken three months after the arrest were also admitted into evidence.

The testimony at the suppression hearing established that no police officers ever attempted to contact a magistrate in order to obtain an arrest warrant. Officer Arnold testified that because it was Saturday he did not think such an attempt would be successful.

If there was previously any doubt, it is now clear that under the Fourth Amendment to the United States Constitution, a warrantless arrest of a person in his own home is per se unreasonable absent exigent circumstances. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980). As the Court stated in *Payton*:

> "The Fourth Amendment protects the individuals privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.' *Silverman v. United States*, 365 U.S. 505, 511 [81

S.Ct. 679, 683, 5 L.Ed. 2d 734]. In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without warrant."

445 U.S. at 489-590, 100 S.Ct. at 1381-1382.

However, we need not decide whether the warrantless arrest made in this case violated the Fourth Amendment to the United States Constitution.

In Texas, a peace officer's authority to make a warrantless arrest is controlled exclusively by statute. *Lewis v. State*, 598 S.W.2d 280 (Tex. Cr. App. 1980); *Honeycutt v. State*, 499 S.W.2d 662 (Tex. Cr. App. 1973). The Code of Criminal Procedure authorizes very few exceptions to the general requirement that a peace officer obtain a warrant before making an arrest.[1]

At the pre-trial hearing held in this case, the State relied solely upon V.A.C.C.P., Art. 14.04, as authority for the warrantless arrest of the appellants. Art. 14.04 provides:

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

There is no question in this case concerning the credibility of the information given to the arresting officers by the complaining witness. Neither is there a question con-

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[1]See V.A.C.C.P., Arts. 14.01, 14.04, 18.16.

cerning whether the arresting officers had probable cause to believe that a felony had been committed. The sole question in this case is whether the State met its burden of proving that the arresting officers reasonably believed that the appellants were about to escape, so that there was no time to procure an arrest warrant.

In *Honeycutt v. State*, 499 S.W.2d 662 (Tex. Cr. App. 1973), we stated:

> "In accordance with the strict construction given exceptions allowing warrantless arrests, this court has always required a clear showing that the person arrested was about to escape. As is often said when considering an arrest without warrant, inarticulate hunches and suspicions are not enough to justify the arrest."

499 S.W.2d at 665. See also, *Hardison v. State*, 597 S.W2d 355, 357 (Tex. Cr. App. 1980) ("A showing that the offender is about to escape is indispensable under Article 14.04 . . . .")

The State argues that the arresting officers reasonably believed that the appellants were about to escape, so that there was no time to procure an arrest warrant. It points out that the arrest took place on a Saturday afternoon, that the suspects had said that they intended to leave for California that day, and that the complainant, who had been released, knew where the suspects lived. The combination of these facts, the State contends, justified the arrest of the appellants without a warrant. We do not agree.

The first, the testimony in the case is clear that Officer Arnold merely assumed that a magistrate would not be available to issue an arrest warrant for the appellants. Neither he nor anyone else even attempted to test that assumption by trying to locate a magistrate. In light of the

other testimony in the case, Arnold's assumption carries little weight.

Shortly after 2:00 p.m. Officer Swafford had received enough information from the complainant to begin the process of obtaining a warrant. He did not attempt to do so.

Officer Arnold arrived at the complainant's apartment about 3:00 p.m. At about 3:30 p.m. he left the apartment and drove to a nearby police substation where he called for back-up officers. He, too, did not make any attempt to contact a magistrate himself or request that anyone else make such an attempt.

Arnold testified that he was aware that Dallas County had numerous judges who had the power to issue warrants. He also testified that on other occasions he had been able to obtain a warrant on a weekend or at night, and that to do so he had called a magistrate at home, if necessary, and then had gone to the magistrate's home to physically obtain the warrant. When he was asked why he did not attempt to obtain a warrant in this case, he replied:

> "Because I have secured many warrants, and it takes a great deal of time in even locating a Judge on Saturday afternoon. It can take hours to get one.
>
> "I did not have hours to sit out there and wait for those people to leave. I felt they were dangerous people and that the community would best be served if I arrested them at that time, rather than try to seek a warrant.
>
> "Knowing the situation and how hard it is to get a Judge on Saturday afternoon, that was the best thing to do, considering the totality of the circumstances."

Arnold was later asked about the times when he had gotten a warrant:

"Q. All right. Before the times you have gotten a warrant, how long did it take on an average?

"A. I couldn't really give you an average figure. Sometimes, you can't find anybody, so you can't even place a time period on it.

"Q. And sometimes you can just find them and get a warrant — like that?

"A. That's right.

"Q. So, it could run from thirty minutes to an hour, to not finding anybody?

"A. That's right."

Since Arnold testified that on other occasions he had been able to obtain a warrant on a weekend, and since he conceded that the time involved in doing so could have been as little as half an hour, depending on the availability of a magistrate, we are unwilling to hold that the State has met its burden of showing that there was no time to procure a warrant. Absent proof that attempts were made to locate a magistrate and obtain a warrant, Arnold's bare assumption that such attempts would be unsuccessful carries little weight.

In addition, after their arrest, the appellants were transported to the city jail. They were then identified by Herdman, booked into the jail, and *taken before a magistrate* for arraignment. Thus the testimony establishes that a magistrate was on duty at least a few hours after the arrest.

Officer Arnold was questioned about the presence of a magistrate at the jail:

"Q. When you took the defendants down to the station, you said you took them to arraignment?

"A. No. I didn't take them directly to be arraigned, no.

"Q. But after you photographed them and they were processed, you finally took them to arraignment?

"A. Yes, sir.

"Q. And who arraigned them?

"A. Tom Boardman.

"Q. And what is Tom Boardman?

"A. *Tom Boardman is a weekend Judge down there,* the best I am able to determine, a practicing attorney.

"Q. *Are you aware that he can issue warrants?*

"A. *Yeah, I guess he can.*

"Q. All right. Did you talk with Mr. Boardman before that — before you took them in for arraignment?

"A. Yes, sir. I talked to him at the time I took them in.

"Q. Was Mr. Boardman about to leave duty that day?

"A. Yes, sir. He was fixing to come down to the County, as I recall.

"Q. So, he had been there for some time, or at least before that time?

"A. I don't know how long he had been there. I know he said something about going down to the County. I don't know when he came down.

"Q. Have you ever secured a warrant from Mr. Boardman?

"A. No, sir.

"Q. Do you usually take people you arrest on Saturdays to be arraigned there at the City, after you finish with them?

"A. No, sir. I usually don't.

"Q. *But do you have knowledge that they are usually taken to be arraigned?*

"A. *They are usually arraigned, yes.*

"Q. *And that's by a Magistrate or a City Judge down there?*

"A. *Yes, sir.*

"Q. Do you remember approximately what time it was that you took them in to be arraigned?

"A. Oh, eight or nine o'clock. I would have to guess. I don't know.

* * * *

"Q. Now, I believe you said a while ago that Judge Boardman was on duty at City Hall sometime when you got back down there, is that right?

"A. He was up at the jail when I went up with the prisoners.

"Q. *Now, is there not always — at least on weekends, mostly in the daylight and evening hours — a Judge on duty in City Hall?*

"A. *I don't know, to tell you the truth. I would assume that they are down there for arraigning prisoners, but I really don't know.*

I normally don't personally take prisoners to be arraigned.

"Q. *Well, isn't it a fact, officer, that there is a Municipal Judge, at least one, on duty, or Peace Judges, or part-time Judges like Mr. Boardman on duty all weekend long at the City Hall?*

"A. *That may be true. I don't know.*

"Q. Are you aware of Judge Cleo Steele here in the County Courthouse?

"A. Yes, sir.

"Q. And he's a Peace Judge?

"A. Yes, sir." (Emphasis added)

This testimony, too, undercuts the validity of Officer Arnold's assumption that a magistrate would have been difficult to locate. Absent a showing that attempts to locate a magistrate were unsuccessful, Arnold's assumption in this case simply cannot sustain the State's burden. *See Hogan v. State*, 631 S.W.2d 159 (Tex. Cr. App. 1982).

Second, the testimony in the case regarding the reasonableness of the arresting officers' belief that the appellants were about to escape is ambiguous at best. Since the State has the burden of proving that a warrantless arrest falls within one of the statutory exceptions, ambiguity must be resolved against the State.

The complaining witness testified as follows:

"Q. . . . As best you can recall, what were the words you told [the police officers] about what [the appellants] were going to do after they had let you off?

"A. I just said every one of them was going to move out of the house and leave, and some of them were talking about going back to California.

"Q. Did they give you any time frame of when they were going to do that?

"A. That day.

"Q. That same day?

"A. Yes, sir.

"Q. Each of them told you that?

"A. Yes, sir. They all said they was moving out that day.

"Q. Were any of them packing while you were in there?

"A. No, sir. Three of them were passed out on the floor, or asleep on the floor, or whatever, and Martinez was still awake.

"Q. Did you tell the officers that three of them were passed out on the floor and one of them brought you back?

"A. I believe so, yes, sir. I don't know."

According to this testimony, the appellants said that they intended to leave for California that day. There was no testimony in the record which indicated that they ever said that they planned to do so immediately after releasing the complaining witness. Furthermore, the complaining witness knew that three of the four assailants were incapable of immediate departure since they were passed out or asleep when appellant Martinez took the complaining witness back to his apartment. The record does not clearly show whether the complaining witness communicated this

knowledge to the police officers, but again, since the State has the burden of proving that the officers reasonably believed that the appellants were about to escape, any ambiguities must be resolved against the State.

In addition, Officer Arnold's own testimony casts doubt upon the reasonableness of such a belief:

"Q. You didn't think [the appellants] would leave without getting in the car?

"A. Without getting in the car or getting on a motorcycle. I didn't think they would walk on foot, as long as they had transportation available, so I didn't think they would be walking out the back door or something.

* * * *

"Q. Now, you had been told that — by Herdman — that the four individuals in that house had told him they were going back to California as soon as they could move out of the house?

"A. They were talking about it among themselves.

"Q. Now, during the twenty-five to thirty minutes that you observed the house, you knew the car was there?

"A. Yes, sir.

"Q. You had seen it as you were going to the Northwest Substation?

"A. Uh-huh.

"Q. It was still there in the same position when you came back by?

"A. Yes, sir.

"Q. You assumed they were in the house?

"A. I assumed they were in the house.

* * * *

"Q. . . . From your viewpoint, at your observation point, was there any attempt to move out of the house or escape by the people inside of it?

"A. No, sir.

* * * *

"Q. . . . Was there ever a point of time when that house was not under surveillance, guard, or security?

"A. Yes, sir, there was.

"Q. That was while you were at the substation making a phone call?

"A. Yes, sir.

"Q. That was the twenty-five or thirty minutes —

"A. No, sir. It was more like five or six minutes, or seven minutes.

"Q. So, at least five or six minutes from the time you learned the address or location of the house, there was never more than five or six minutes of time when the house wasn't under police control or guard; is that right?

"A. Yes, sir.

"Q. And would that have been by you and some other officers, or some other officers when you weren't there, or what?

"A. From the time I learned the location of the automobile and the address, there was only a five or six minute span — seven minutes — whatever — that it was not under observation."

According to this testimony, Officer Arnold had the appellants' house under continuous observation from the time he left the complaining witness's house, which other testimony showed was about 3:30 p.m., until he and the back-up officers made the arrests about 4:15 p.m., with the exception of the five to seven minute period while he made the telephone call. Furthermore, the appellants' expected means of departure, their car, was also under observation. At no time did Arnold see any attempt to escape, or even any preparations for escape. He simply waited at his observation post until the back-up officers arrived and then made the arrest. This is simply not a case where quick action by the police, so that there was no time to procure a warrant, was necessary to prevent the appellants' imminent escape.

The dissent characterizes our opinion as requiring the State to show that the appellants were in the midst of their escape. It should not be so read. We only hold that the State has not met its burden of proving that the arresting officer reasonably believed that the offenders' escape was imminent.

The dissent cites a number of cases which it believes require us to uphold this warrantless arrest. Our reading of those cases persuades us that they are distinguishable on the fact, or are not controlling authority because they simply do not appear to have addressed the issues presented by this appeal.

The dissent appears to cite *Rose v. State*, 470 S.W.2d 198 (Tex. Cr. App. 1971), for the proposition that the State can meet its burden of showing that a magistrate was unavailable by showing that a police officer assumed that fact. We do not so read *Rose*. The opinion in that case states, "The officers testified that they did not have time to procure a warrant after talking to Jeffries [the complaining witness] shortly before the arrest." *Id.* at 199. Nowhere in the opinion is there an indication of what evidence the State presented; however, nowhere is there an indication that the defendant challenged the testimony of the officers. In this case, as indicated above, there was testimony which severely undercut the bare assumption of unavailability made by the arresting officer.

Furthermore, in *Rose* the complaining witness told the arresting officer that the defendant was about to leave or had possibly already left. When the witness and the police officer arrived at the address given by the complaining witness, they were told that the defendant had already left. Here, the arresting officer may have been told that three of the four assailants were incapable of immediate departure. The arresting officer also testified that he assumed that the appellants were still at their house, and that the house was under almost constant surveillance. We think *Rose* is distinguishable on the facts.

In *Thornton v. State*, 451 S.W.2d 898 (Tex. Cr. App. 1970), as in *Rose*, there is no indication in the Court's opinion that the officers' assertion that they did not have time to obtain a search warrant was disputed. Furthermore, there is no indication that the arrest was challenged upon the basis that no one had told the officers that the defendants were about to escape. The same is true of *Flanagan v.*

State, 465 S.W.2d 755 (Tex. Cr. App. 1971). For these reasons we do not regard these cases as authority for this cause.

In *Maloy v. State*, 582 S.W.2d 125 (Tex. Cr. App. 1979), the arrest took place at approximately 3:00 to 3:30 a.m. As the Court's opinion stated, "the testimony is undisputed that there was no magistrate available at that hour." *Id.* at 127. There is also no indication in the opinion that the complaining witness' statement that the defendant was about to "bug out" and leave the city soon was disputed.

In *Loving v. State*, 559 S.W.2d 363 (Tex. Cr. App. 1977), the arrest took place a few hours after the crime. However, more importantly, the defendants were driving in a car at the time the arrest occurred. See also, *Myre v. State*, 545 S.W.2d 820 (Tex. Cr. App. 1977); *Washington v. State*, 518 S.W.2d 240 (Tex. Cr. App. 1975); *Green v. State*, 470 S.W. 2d 901 (Tex. Cr. App. 1971). In each of those cases the defendants were arrested shortly after the commission of the crime and while they were driving in their cars. They were, therefore, already mobile and able to escape. That is not the case here.

As we view it, V.A.C.C.P., Art. 14.04, contains four requirements: (1) the person who gives the information to the peace officer must be credible, (2) the offense must be a felony, (3) the offender must be about to escape, and (4) there must be no time to procure a warrant. In this case, there is no question that the first two requirements have been met. However, we hold that the State has failed to meet its burden of proof on the last two requirements.

The evidence shows that the appellants were in their own home, under surveillance for at least forty-five minutes, that their expected means of escape was also under sur-

veillance, that no attempt to escape or even preparation for escape was shown, and that the arresting officers may have been told that three of the four assailants were passed out or asleep when the complaining witness was released. In addition, the evidence shows that one of the arresting officers had secured warrants in the past on weekends and at night, that although it sometimes took a long period of time to do so, at other times it took no more than half an hour, that he was aware that there were numerous judges in Dallas County who could issue a warrant, that he was not sure whether a judge was on duty all weekend at City Hall, and that no attempt was ever made to contact a magistrate. On this record, we simply cannot hold that the State has met its burden of proving that the offenders were about to escape, so that there was no time to procure a warrant.

The facts of this case fail to justify the appellants' arrest in their home without a warrant. For this reason, the items seized at the time of their arrest, and the photographs taken at or near that time, should not have been admitted into evidence. V.A.C.C.P., Art. 38.23.

We turn now to the admissibility of the three photographs taken of the house three months after the arrest. These photographs were apparently taken after the appellants had moved out of the house, and at a time when the house was available for lease. We hold that under these circumstances, any taint from the illegal arrest was sufficiently purged. State's Exhibits Nos. 45, 48 and 49 were properly admitted into evidence.

Because the other items and photographs were improperly admitted into evidence, these causes are reversed and remanded.

CLINTON, Judge, concurring.

Relatively recently the Court approved the following statement in *Hardison v. State*, 597 S.W.2d 355, 357 (Tex. Cr. App. 1980):

> "As showing that the offender is about to escape is *indispensable* under Article 14.04, supra. *Honeycutt v. State*, supra [499 S.W.2d 662]. See *Butler v. State*, 151 Tex. Cr. R. 244, 208 S.W.2d 89 (1948)."[1]

Finding in *Honeycutt* that accused was arrested while in her home, in bed, militated against a showing that she was about to escape, the Court deemed "[e]specially pertinent" *Rippy v. State*, 122 Tex. Cr. R. 101, 53 S.W.2d 619 (1931), *Honeycutt*, supra, at 664. Writing for the Court more than fifty years ago, Judge Hawkins coined the original phrase we restated in *Hardison v. State*, supra. He explained:

> ". . . That part of the statute which says that 'the offender is about to escape' is *indispensable*. That such condition did not exist in the present case seems to be without dispute in fact. At the time the officer went to appellant's house, appellant was partially undressed and in bed."

Rippy v. State, supra, 53 S.W.2d at 627.[2]

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[1]All emphasis is mine unless otherwise indicated.

[2]Judge Hawkins wrote on State's motion for rehearing. An earlier protest by Judge Lattimore to grant the motion of appellant for rehearing and reversing the judgment of conviction and remanding the cause indicates that we are not addressing a new problem, viz:

> ". . . What was the officer to do? Here was a man of whose guilt the officer plainly believed himself to have satisfactory proof. If he had gone without arresting in such case and the accused had gotten in a car and traversed the few miles over the highway to the border of our sister state of Oklahoma, the officer would likely have had serious difficulty in escaping just criticism, if not more serious consequences." Id., 53 S.W.2d at 625.

As noted by the Court in *Honeycutt*, "Imminent escape has long been held essential to a warrantless arrest under Article 14.04, supra, and its precursor . . . [citing cases]." One obvious reason is that exceptions allowing warrantless arrests are given "strict construction," *Id.*, at 665. And, in that connection, the closing clause of Article 14.04, indicative of a limitation imposed on the legislative authorization, has generally been overlooked: ". . . such peace officer may, without a warrant, *pursue and* arrest the accused." Though the Court has not literally applied the underscored language so as to require that the alleged accused actually be fleeing, for a long time now it has insisted the facts in each individual case present objectively a situation in which pursuit is liable to follow at once if arrest is not made.[3]

Since I agree from the evidence there is not a clear showing that the persons arrested were about to escape, with these additional comments I join the opinion of Judge Roberts and the judgment of the Court.

McCORMICK, Judge, dissenting.

A review of the evidence shows that the arresting officers acted prudently and in accordance with Article 14.04, V.A.C.C.P., in making the arrests in question. The record reflects that the victim was abducted at 3:00 a.m. and released by his captors at approximately 2:00 p.m. that afternoon. He then related his ordeal to the police. The interview with police was concluded between 3:15 and 3:30 p.m. The police thereafter had one officer immediately place the house under surveillance until back-up officers

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[3]Just recently in **King v. State**, 631 S.W.2d 486 (Tex. Cr. App. 1982), this Court concluded that "manifestly, from the 'concrete factual situation' spread on the record, it must be apparent that the offender was, in fact, 'about to escape'." (P. 497).

could arrive. The arrests were carried out at 4:15 or 4:20 p.m.

The victim testified:

"Q. Did any of the persons seated in the courtroom ever make any statements to you about leaving the jurisdiction of this county?

"A. Yes, sir.

"Q. And who was that?

"A. All of them did.

"Q. Okay. And when was this?

"A. It was during the night that I was held at the house.

"Q. And what did they say?

"A. They all just said that they was leaving.

Some of them said they was going back to California. And Martinez — when he took me home that day, he said that he was going to leave just as soon as he got back.

"Q. Just as soon as he got back?

"A. Just as soon as he got back and packed his stuff up, he was leaving.

"Q. Okay. Did you tell the police officer that they were planning to leave for California?

"A. Yes, sir."

On cross-examination, he testified:

"Q. So, between the hours of 3:00 a.m. and 2:00 o'clock, when Martinez dropped you off, they — the four

defendants had collectively, at one time or another during the morning, or during the day had told you they were going back to California?

"A. Yes, sir.

"* * *

"Q. . . . As best you can recall, what were the words you told them (police) about what they were going to do after they had let you off?

"A. I just said every one of them was going to move out of the house and leave, and some of them were talking about going back to California.

"Q. Did they give you any time frame of when they were going to do that?

"A. That day.

"Q. That same day?

"A. Yes, sir.

"Q. Each of them told you that?

"A. Yes, sir. They all said they was moving out that day."

An examination of the officer's testimony reveals the following:

"Q. At that time, did you believe that you had time to procure an arrest warrant for the persons you believed had assaulted and robbed Robert Herdman?

"A. No, sir.

"Q. Why was that?

"A. Because they had talked of, in front of the complainant, leaving for California immediately; and I presumed they were preparing to leave.

"Q. Did you also have information that the persons in that house were armed?

"A. Yes, sir."

As soon as back-up officers arrived, the arrests were made. On cross-examination, the arresting officer testified:

"Q. So, would that be Sergeant B. F. Fowler that you talked to?

"A. Yes, sir.

"Q. Did you discuss with him the availability of a City Magistrate on that telephone conversation?

"A. I said to him, 'I don't think that we have got time to try to find a Judge and get a warrant, do you?' And he said, 'No, I don't.'

"Q. Was that the extent of your conversation?

"A. Just about.

"Q. Was there anything else, if you can possibly recall, about the availability of a Magistrate?

"A. We talked about briefly in just about those words that I gave you — that it was Saturday afternoon, that there's not going to be a Judge available, and we just had to do what we had to do.

And he said, 'That sounds fine. You're exactly right. I will send you the man I have got here. Just do what you have to do.'

"* * *

". . . I told him that I didn't have time to get a warrant, that I had some dangerous people in the house, who needed to be arrested.

He concurred that there was not enough time to get a warrant, and said to go do what I had to do.

"Q. Okay. Now, what was there about —

From your viewpoint of observing that house, what was there about the situation, from your point of observation, that causes you to say that there was not enough time to secure a warrant?

"A. Because I have secured many warrants, and it takes a great deal of time in even locating a Judge on Saturday afternoon. It can take hours to get one.

I did not have hours to sit out there and wait for those people to leave. I felt they were dangerous people and that the community would best be served if I arrested them at that time, rather than try to seek a warrant. Knowing the situation and how hard it is to get a Judge on Saturday afternoon, that was the best thing to do, considering the totality of the circumstances."

Article 14.04, V.A.C.C.P., provides:

"Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is *about to escape*, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused." (Emphasis added)

The majority says that the mere assumption by an experienced police officer that a magistrate would not be

readily available carries little weight. However, in *Rose v. State*, 470 S.W.2d 198 (Tex. Cr. App. 1971), as here, the officer's assumption of the nonavailability of a magistrate was sufficient. There has never been a requirement that an attempt be made to contact a magistrate before an Article 14.04, supra, arrest can be made. Further, even if a magistrate had been readily available, the time to be taken in driving to the magistrate, setting out the probable cause, having it reviewed, and proceeding to the arrest might well have resulted in the escape of the suspects. When an armed offender is preparing to escape, time is of the essence. The statute reflects this. Even if the delay had been only thirty or forty-five minutes, such delay may have been critical. The majority seems to ignore this factor. The officer assumed a magistrate would not be readily available. But even if one had been available, the officer could not have afforded the delay in making the arrest when he had reason to believe the offenders would be leaving at any moment.

The majority says that the assumption that a magistrate was unavailable is shown to be incorrect because the appellants later received magistrate warnings. However, this was between 8:00 and 9:00 p.m., not at the time of arrest.

Next, the majority claims that the record reflects that the victim testified that he told the officers that when he was released three of the four abductors were asleep or passed out and, therefore, the officers should have known there was no exigency in making the arrest. However, the record shows the victim testified as follows:

"Q. Did you tell the officers that three of them were passed out on the floor and one of them brought you back?

"A. I believe so, yes, sir. I don't know."

It seems that such answer is different than that reported by the majority as a reason for not finding any exigency.

The majority points out that when the officers made their raid, three of the defendants were asleep or passed out. However, it is settled that questions concerning the legality of an arrest must be examined as the situation appeared to the officer at the time and not as it appears by hindsight, *Talbert v. State*, 489 S.W.2d 309 (Tex. Cr. App. 1973).

Finally, the majority points out that an officer had the house and car under surveillance and that no defendants were seen leaving the house prior to the arrest. It has never been held that a defendant must be in the process of escaping before Article 14.04, supra, is applicable. The statute itself reads "about to escape." If the State were required to show that the defendants were in the midst of their escape, the statute would have said "and that the offender is escaping." All the State must do is show that the officer had reason to believe that the offender is *about to escape*. Certainly that was done in this instance when the officer was told that afternoon that all of the offenders had said they would leave that day and one had indicated his leaving was imminent. This Court in *Tarpley v. State*, 565 S.W.2d 525 (Tex. Cr. App. 1978), in upholding a warrantless arrest on the basis of Article 14.04, stated, "Contrary to appellant's contention, the fact that he and Hudson were not in the act of escaping at the time of the arrest is immaterial." 565 S.W.2d at 530. In that case, as here, the officers were told facts that led them to believe that the defendants were *about to escape* though there was no showing that the defendants had commenced the escape. Such was held sufficient to authorize a warrantless arrest. If an

officer were forced to wait until the escape by armed and dangerous persons was commenced, the lives of the offenders, police, and innocent bystanders could be endangered. The statute does not require such a result, and, before today, neither had this Court. See *Rose v. State*, supra; *Maloy v. State*, 582 S.W.2d 125 (Tex. Cr. App. 1979).

Rutherford v. State, 104 Tex. Cr. R. 127, 283 S.W. 512 (1926), was a reversal in which this Court, in interpreting the predecessor to Article 14.04, said that the officer must obtain a warrant unless he knows or is advised that the offender is about to escape. That is the situation confronted here by the police. The officer had been advised by the victim that the offenders were about to escape.

Maloy v. State, supra, is a case extremely similar to the instant case. There the police, apparently late at night and after obtaining probable cause to arrest, had been told that the defendant was going to "bug out" soon. There was, as here, testimony that a magistrate was not readily available. There was no showing an attempt was made to locate a magistrate. This Court upheld the warrantless arrest of the defendant in his residence pursuant to Article 14.04 on the basis that the officers had information that he was about to escape. Again, there was no showing that the defendant was escaping, only that the officers had information that the defendant was about to escape. If the majority is going to reverse the instant case, *Maloy* should be distinguished or overruled.

In *Loving v. State*, 559 S.W.2d 363 (Tex. Cr. App. 1977), the officer, after obtaining probable cause to arrest the defendant, apparently failed to seek an arrest warrant. This was at approximately 9:00 p.m. or shortly thereafter. Instead, he put out a pick-up order and resumed patrol. He then saw the suspects driving about, evidently in the same

area. There is no indication that the suspects attempted to flee. During the search incident to arrest, inculpatory evidence was found. This Court, citing Article 14.04, upheld the arrest because it occurred only a few hours after the crime. The opinion was silent concerning the availability of a magistrate or any attempt to obtain a warrant.

In *Rose v. State*, supra, police officers were stopped by the victim of a robbery. The victim told the officer who had committed the robbery and where it occurred. The victim also stated that the suspect had left the premises or would be leaving soon. The officers later arrested the defendant. The officers testified that they did not believe they had time to attempt to procure a warrant. There is no indication an attempt was made to secure a warrant. When arrested, the defendant was in his house and had not begun to escape. Citing Article 14.04, this Court upheld the warrantless arrest. This Court distinguished that case from another warrantless arrest case, *Vinson v. State*, 138 Tex. Cr. R. 557, 137 S.W.2d 1048 (1940), in which the arrest was invalid. The Court held that the fact that the officers had been told by the victim that the offender would soon be escaping justified the warrantless arrest. The Court said:

> "In the present case the officers testified that Jefferies (victim) told them that Rose (defendant) was about to leave. The specific words 'about to escape' do not have to be used to show that such an arrest may be authorized without a warrant under Article 14.04, supra." 470 S.W.2d at 200.

The distinction present in *Rose* is likewise present here.

In *Thornton v. State*, 451 S.W.2d 898 (Tex. Cr. App. 1970), the defendants were arrested in an apartment without a warrant. This Court justified such arrest under Article

14.04 because there was no time to secure a warrant even though in that case no one had told the officers that the defendants were leaving. There the officers simply feared that the defendants might leave the location where they had been spotted. The officer, who first located the apartment where the defendants were, waited for back-up support before making the arrests. The defendants had not yet commenced any escape at the time of the arrest.

Virtually indistinguishable from the case at bar is *Flanagan v. State*, 465 S.W.2d 755 (Tex. Cr. App. 1971). In that case the police received word that the defendants were in a certain apartment and were about to leave town. The officer testified that he did not believe he had time to obtain a warrant. No showing was made that he made any attempt to contact a magistrate. This Court upheld the warrantless arrest pursuant to Article 14.04.

This case presents a far stronger argument for a warrantless arrest than *O'Neal v. State*, 416 S.W.2d 433 (Tex. Cr. App. 1967). There the defendant claimed his arrest was illegal because there was no evidence he was about to escape. This Court said:

> "In his fourth ground of error, appellant insists that the court erred in admitting the pair of shorts (state's exhibit 9), in evidence because they were obtained as the result of a search following an illegal arrest.
>
> "The facts presented by the state relative to the arrest show that about 7 o'clock on the evening following commission of the offense, Deputy Sheriff J. N. Dechman received information from a businessman whom he considered to be credible that one of the three men being sought for the rape was named Lynwood

and that one was named Alexander. Between 8 and 9 p.m., the officer had ascertained the name of Lynwood O'Neal and a description of his car. The officer also had information that appellant would be in a certain general area and felt that if he took the time to try to find a magistrate to obtain an arrest warrant appellant might leave the area. At 10 p.m., he found appellant talking to another officer who had no intention of arresting him. The car meeting the description given was parked nearby. He then arrested appellant. Officer Dechman testified that it would have taken at least forty-five minutes for him to have gone after an arrest warrant and he felt that, had he done so, appellant might escape.

"Under the record, the officer was authorized to arrest appellant without a warrant, under the provisions of Art. 215, Vernon's Ann. C.C.P. of 1925, now Art. 14.04 of the 1965 Code, upon receiving information that the felony offense had been committed and fearing that appellant would escape. See: *Price v. State*, Tex. Cr. App., 410 S.W.2d 778, and cases therein cited." 416 S.W.2d at 435.

The Court concluded that the arrest and subsequent search were legal.[1] There was, however, as here, no showing

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[1]The concurring opinion notes that the Fifth Circuit granted O'Neal relief. However, the Fifth Circuit granted relief only because they found that the officer lacked sufficient probable cause to arrest O'Neal. That issue is entirely separate from the issue before us today and from the quoted excerpt from **O'Neal v. State**, supra. Surely my brother Clinton does not contend that there was a federal constitutional requirement for a warrant in the **O'Neal** case. See **United States v. Watson**, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed. 2d 598 (1976). Just as surely there can be no serious argument made here that the police lacked probable cause. The distinction btween probable cause for arrest and belief that a person is about to flee, both of which are required for a warrantless arrest, should not be confused.

an attempt was made to locate a magistrate. See also, *Sutton v. State*, 495 S.W.2d 912 (Tex. Cr. App. 1972); *Washington v. State*, 518 S.W.2d 240 (Tex. Cr. App. 1975); *Price v. State*, 410 S.W.2d 778 (Tex. Cr. App. 1967); *Jones v. State*, 565 S.W.2d 934 (Tex. Cr. App. 1978).

The majority cites only two cases in discussing the legality of the arrest under Article 14.04, supra. These are both cited for the proposition that the right to a warrantless arrest is controlled by statute. I have no quarrel with such proposition. However, the majority does not bother to cite one case in examining whether the arrest in question was valid. The majority simply overrules, sub silentio, numerous cases previously decided by this Court.

Second, even if the search violated Article 14.04, any error in admitting the seized evidence was harmless beyond a reasonable doubt. The victim testified positively that the appellants were the ones who had beaten and tortured him over an eleven hour period. His fiancee testified that she recognized two of the appellants as the persons who had attempted to burglarize the victim's apartment after he had been abducted. The fiancee got the license number of the car driven by the appellants. The car was found parked outside the house where they were arrested. Pictures of the house were identified by the victim as the place he was held. The entire tenor of the defense approach in cross-examination was not to cast doubt upon the identification of the appellants, but rather was an attempt to imply that the appellants believed that the victim precipitated the incident by stealing money from one of the appellants.

In *Holcomb v. State*, 484 S.W.2d 938 (Tex. Cr. App. 1972), cert. denied 410 U.S. 940, 93 S.Ct. 1404, 35 L.Ed. 2d

606 (1973), this Court held that, where the victim testified positively as to the defendant's identity, any error in admitting certain evidence seized as a result of an illegal arrest was harmless.

For the above reasons, I dissent.

OPINION ON STATE'S MOTION FOR REHEARING

ODOM, Judge.

These appeals are from convictions for aggravated robbery. Punishment was assessed at seven years in each case.

A single ground of error was raised in the brief filed on behalf of both appellants. In it appellants argued that evidence admitted at trial was the product of an unlawful arrest and incident search and seizure, relying on Art. 14.04, V.A.C.C.P., and the Texas and United States Constitutions. On original submission a divided panel held the requirements of Art. 14.04, supra, were not satisfied and reversed the convictions. On rehearing we conclude the panel misconstrued the requirements of Art. 14.04, and we find the evidence was not unlawfully obtained.

Art. 14.04, supra, provides:

> "Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

The panel majority construed this statute to contain four requirements:

> "(1) the person who gives the information to the peace officer must be credible, (2) the offense must be a felony, (3) the offender must be about to escape, and (4) there must be no time to procure a warrant."

In applying this construction to the facts of the case, the panel majority looked for evidence that the offender in fact was about to escape and that there was in fact no time to procure a warrant. Finding insufficient evidence of these two requirements, the panel majority held the arrest was unlawful.

[1] We hold Art. 14.04, supra, does not require a showing that the offender in fact was about to escape, nor does it require a showing that there in fact was no time to procure a warrant. The statute merely requires a showing that the officer was acting upon satisfactory proof from representations by a credible person that the felony offender "is about to escape, so that there is no time to procure a warrant."

Honeycutt v. State, 499 S.W.2d 662 (Tex. Cr. App.), relied on by the panel majority, is clearly distinguishable from the facts in this case. In *Honeycutt* the defendant "was home in bed with her shoes removed. The record reflects that [the arresting officer] knew she lived there for more than a year. There was no evidence of an escape or an attempt to escape." Likewise, in *Rippy v. State,* 122 Tex. Cr. R. 101, 53 S.W.2d 619, the defendant's arrest was not authorized under the predecessor of Art. 14.04, where the record showed the defendant was partially undressed and

in bed when arrested, and there was no evidence he was about to escape.

In sharp contrast to the evidence in *Honeycutt* and *Rippy* are the facts presented in *Maloy v. State*, 582 S.W.2d 125 (Tex. Cr. App.), and in the instant case.

In *Maloy*, supra, a credible person reported to the arresting officers the defendant's "name and address and told them that he was about to 'bug out' or flee the city soon." This was held sufficient to authorize an arrest under Art. 14.04, supra.

[2] Even stronger are the facts in this case, where it is undisputed that the robbery victim reported to investigating officers that one of the robbers told him "Just as soon as he got back and packed his stuff up, he was leaving," and that several of the robbers said they were leaving for California that day. This clearly was sufficient to constitute a report "that the other offender is about to escape, so that there is no time to procure a warrant." It is also sufficient to show exigent circumstances authorizing a warrantless arrest under Texas and federal constitutional law.

The State's motion for rehearing is granted and the judgments are affirmed.

ONION, P. J., and ROBERTS, CLINTON and TEAGUE, JJ., dissent.

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NO. 82-1211

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

JAMES FRANCIS FRY and JIMMY RINCON MARTINEZ,
Petitioners

V.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WHETHER THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' WARRANTLESS ARREST IN THEIR HOME TO OVERCOME THE PER SE UNREASONABLENESS OF SAID ARREST?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to the Petition for Writ of Certiorari submits its Brief in Opposition:

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals appears as an appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Texas Court of Criminal Appeals by panel opinion reversed Petitioners' convictions on June 9, 1982, whereupon Respondent filed a motion for rehearing. The court below sitting *en banc* affirmed the convictions on October 6, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and th persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

Article 14.04, Code of Criminal Procedure of the State of Texas, V.A.C.C.P.:

> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is not time to procure a warrant, such peace officer may, without a warrant, pursue and arrest the accused.

STATEMENT OF THE CASE

The Court is herein referred to pages in the transcription of trial testimony on file in the court below, *i.e.*, the Statement of Facts (SF). The Court is also referred to

the facts as set out in the opinion of the court below beginning at A-1 in the Appendix to the petition.

Petitioners were among four persons accused of committing aggravated robbery upon the complainant Robert Herdman on March 25, 1978, in Dallas, Texas. Herdman testified that upon taking William Paddock home at 3:00 a.m. on March 25, 1978, he was ordered, at gunpoint, into a house that was three blocks from his apartment. Thereafter, Herdman, according to his testimony, was beaten and robbed of all his money by four individuals over a period of approximately ten and one-half to eleven hours. Herdman was taken back to his apartment at 2:00 p.m. on the same day and reported what happened to Dallas Police Officer Swafford (SF 43-88).

Herdman's fiancee, Carol Hutrya, testified that two men attempted to burglarize Herdman's apartment earlier that morning around 5:00 a.m. She testified that one of the men was Paddock, whom Herdman had earlier left to take home, and the other was Petitioner Fry. Hutrya reported the incident to Officer Duesman and after they both drove around the neighborhood no car fitting the description of the one Herdman and Paddock left in earlier was found. She did not see Herdman again until around 2:00 p.m. when he returned to his apartment (SF 89-163).

Officer Duesman was given a description of the car by Hutrya. The license number was stated to him and that it was an out-of-state plate, possibly California. The car was a blue and white Chevrolet. Duesman made a written report and left it for his replacement watch (SF 164-186).

Investigator J. C. Arnold during the afternoon of March 25, 1978, received a call to proceed to 2833 Community Drive. He arrived there at approximately 3:00

p.m. (SF 212), and talked to Officer Swafford and then to Herdman (SF 213). Arnold talked to Herdman for about 30 to 40 minutes and afterward proceeded to a police ubstation where he phoned the Crimes Against Persons Section of the Dallas Police Department. Arnold requested additional manpower. He also told the sergeant on duty that he "knew where the suspects probably were", and that he "didn't have time to secure a warrant" (SF 215). After hearing the facts of the situation the sergeant agreed that there was not sufficient time in which to obtain an arrest warrant. Arnold also testified that on his way to the substation to call downtown he drove past 2415 Community Drive and saw the Chevrolet with California tags parked in front. After making the call he immediately went back to a position across the street from the suspects' house and "sat and watched the house" (SF 219). Further, Arnold stated that "I went over the near Community and Harry Hines where I could observe the house in case the people left" (SF 219). He stated that he watched the house approximately 25 to 30 minutes, and he "didn't see anything occur at the house (SF 220).

Upon arrival of a cover squad, Arnold and the other officers proceeded to the suspects' house at about 4:15 p.m. (SF 222). Arnold knocked on the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four suspects, including Petitioners, were then arrested. Only Petitioner Martinez was awake when the police officers entered the house. At trial the following items, seized in Petitioners' home, were admitted into evidence over objection: a sawed-off shotgun, a shotgun, a rifle, a baseball bat, a wooden club, three spent tubes of toothpaste, a knife, a shotgun shell, and hair specimens. In addition, thirteen photographs of various parts of the house, which were taken at the time of the arrest, were admitted into evidence.

ARGUMENT ON QUESTIONS PRESENTED

I. WHETHER ARTICLE 14.04 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, AS INTERPRETED BY THE TEXAS COURT OF CRIMINAL APPEALS, VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

A. This Court Should Not Consider An Issue Not Previously Raised In The Court Below.

The opinion of the court below begins with the following statement:

> The appellants do not challenge the sufficiency of the evidence. In their sole ground of error they contend that certain evidence admitted at their trial was the product of an illegal search and seizure.

(Petitioners' Brief at A-3).

It is clear that the question of the constitutionality of the Texas Court of Criminal Appeals interpretation of Article 14.04 of the Code of Criminal Procedure has never been raised or addressed in the court below.

The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long standing nature of the rule: "[I]n *Crowell v. Randell,* 10 Pet. 368 (183), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion

that the judiciary act of 1789, C. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails' 10 Pet 368, 391." *Cardinale v. Louisiana, supra* at 391. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point.

Petitioners have never raised the issue of the constitutionality of Article 14.04, Texas Code of Criminal Procedure either at trial or on appeal. The state courts have not had an opportunity to pass on the validity of this state provision. Comity and judicial economy dictate that Petitioners not be permitted to present this issue for the first time in their petition for writ of certiorari.

B. The Court of Criminal Appeals' Application Of Article 14.04 V.A.C.C.P. Is Not An Issue Worthy Of Certiorari.

Petitioners argue that the Texas Court of Criminal Appeals has been inconsistent in its application of Article 14.04 to fact situations involving warrantless arrests. This does not present a federal question. As Petitioners have correctly pointed out:

> Whether the lower court is consistent in applying Article 14.04 is not one which would necessarily invoke the authority of this Court...

(Petitioner's Brief at 10). The only time where this Court's jurisdiction might be invoked is when the lower courts interpret state rules in a manner that does not meet federal constitutional standards with regard to the petition before the court when the issue has been properly presented to the court. Petitioners have failed to satisfy these basic conditions.

II. THERE EXISTED SUFFICIENT EXIGENT CIRCUMSTANCES AT THE TIME OF PETITIONERS' ARREST IN THEIR HOME TO JUSTIFY SAID ARREST.

A. A Fact Question is Not Sufficient To Invoke This Court's Jurisdiction.

Petitioners are raising a question as to the sufficiency of the evidence, which is a question unworthy of this Court's review. Even if it were error to determine that the facts of this case comport with the requisite Article 14.04 VACCP and clearly establish that the requisite exigent circumstances were present, thus satisfying Federal Constitutional requirements, this Court does not sit to correct individual injustices.

The Texas Court of Criminal Appeals, *en banc*, obviously, considered the applicability of Article 14.04 VACCP and the federal constitutional requirements. Petitioners' issue is not sufficiently important to justify this Court's exercise of jurisdiction.

B. Whether Sufficient Exigent Circumstances Existed To Justify The Warrantless Arrests At Issue Here Is A Fact Question Unworthy Of This Court's Attention.

In order to be valid the arrest of Petitioners, being without warrant and in their own home, must fall within one of the exceptions based on the presence of exigent circumstances. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Payton v. New York*, 455 U.S. 573 (1980); *Dorman v. United States*, 435 F.2d 385 (D.C. Cir, *en banc*, 1970).

In considering the issue of exigent circumstances, Petitioners "readily admit that most of the circumstances are successfully met by the State". There is

no question that a grave offense was involved; that the suspects were heavily armed, that there was strong reason to believe that the suspects were in the premises, and the entry was made in the daytime rather than at night. Petitioners further admit that there was a clear showing of probable cause including "reasonably trustworthy information upon which a magistrate could have issued a warrant".

The only issue, dealing with exigent circumstances, challenged by Petitioner is the "likelihood of escape". Petitioners argue that because the house was under surveillance "they were already, in effect, prisoners and unable to escape". The fact that one police officer had a house, containing four armed and dangerous men, under surveillance, hardly establishes that there was no likelihood of escape.

The likelihood of escape must be judged based on the information available at the time of arrest, and not by hindsight, which is always crystal clear. Herdman told the investigating officer that:

> They all just said they was leaving. Some of them said they was going back to California. And Martinez — when he took me home that day, he said that he was going to leave just as soon as he got back.

Petitioners seem to feel that because two hours and fifteen minutes had passed from the time Herdman was freed until the Petitioners were arrested that the likelihood of escape was somehow reduced. The more logical and realistic view is that with the passing of every minute, escape was increasingly more likely. This is particularly true in light of the fact that one of the Petitioners had stated he was leaving immediately after he freed Herdman.

Petitioners also seem to place some importance on the fact that Herdman took a shower before he reported the crime to the police. First, contrary to Petitioners' assertion that Herdman took a shower, the record clearly shows that Herdman had just walked into his apartment when he was met by his girlfriend and the investigating police officer. Even if Herdman did take a shower, it would seem perfectly understandable given his ordeal. While Herdman was held captive for over ten hours he was repeatedly beaten with fists, a chain belt, a baseball bat, beer cans, and the butt of a rifle. Further, Herdman was brutally kicked after being beaten to the floor, beer was poured on him, two men urinated on his face, and paint was sprayed and toothpaste was smeared in his hair. If Herdman took a shower, it shows nothing more than that he was treated in an inhumane manner and subjected to vile and depraved humiliations; a situation where any normal person would have desperately wanted a shower. Whether or not Herdman took a shower, however, has absolutely nothing to do with the likelihood of escape.

As the Texas Court of Criminal Appeals *en banc* pointed out:

> [2] Even stronger are the facts in this case, where it is undisputed that the robbery victim reported to investigating officers that one of the robbers told him "Just as soon as he got back and packed his stuff up, he was leaving," and that several of the robbers said they were leaving for California that day. This clearly was sufficient to constitute a report "that the other offender is about to escape, so that there is not time to procure a warrant." *It is also sufficient to show exigent circumstances authorizing a warrantless arrest under Texas and federal constitutional law.*

(Petitioners' Brief at A 35; emphasis added)

C. Sufficient Exigent Circumstances Existed to Justify The Warrantless Arrest.

Petitioners contend that there would have been no delay in obtaining an arrest warrant and that because no attempt was made to obtain a warrant, the arrest was unreasonable. This assertion is clearly not supported by the facts. As the panel opinion of the Texas Court of Criminal Appeals points out:

> Arnold left Herdman's apartment about 3:30 p.m. and drove to a nearby police substation. He called the Crimes Against Persons Section downtown and requested additional manpower to assist him in arresting the four men described by Herdman. He told the sergeant on duty that he "knew where the suspects probably were" and that he "didn't have time to secure a warrant."
>
> After making the call, Arnold drove to a position near the house. He kept it under surveillance until the back-up officers arrived about thirty minutes later. During that time Arnold saw nothing occur at the house.
>
> About 4:15 p.m., Arnold and the other officers surrounded the house. Arnold knocked on the door and identified himself as a police officer. When one of the other officers saw movement inside the house, Arnold kicked open the door. All four men were then arrested, and numerous weapons and other items were seized.

(Petitioner's Brief at A5).

It is clear that there was only a forty-five minute lapse from the time the suspects were first located until they were apprehended. Most of this time was spent in arranging for officers to assist in effecting the arrest.

The decision that there was not sufficient time within which to obtain a warrant was based on several factors. First, the men were heavily armed and dangerous. Second, the men had clearly indicated their intent to leave as soon as possible. Third, the police were made aware of the suspects' intent to leave by a reliable source. Fourth, when Officer Arnold called the station he discussed the situation with his sergeant, who testified that he had been on the police force for twenty years. Based on the information available and the extensive experience of the officers involved, it was determined that there was not sufficient time within which to obtain a warrant. This decision was, without question, reasonable. It was not a decision based on "inarticulate hunches and suspicions. . .".

CONCLUSION

Petitioners did not raise the issue of the constitutionality of Article 14.04, V.A.C.C.P. below, and may not raise it for the first time in their petition for writ of certiorari. Further, the facts of this case clearly establish that there were exigent circumstances which met all the requisites of the Fourth Amendment of the United States Constitution for a warrantless arrest.

Respectfully submitted,

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